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No. 94-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

SAM BROWN COMPANY,
Petitioner,

v.

JACOBS MANUFACTURING COMPANY,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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51 pp

QUESTIONS PRESENTED

The questions presented, which this Court left unresolved in *Briggs v. Pennsylvania R. Co.*, 334 U.S. 304, 68 S.Ct. 1039, 92 L.Ed. 1403 (1948), are now the subject of (1) conflicting decisions among the Courts of Appeals, and (2) an Advisory Committee note to F.R.A.P. Rule 37, 28 U.S.C.A. They are as follows:

1. Whether, upon the reversal of an erroneous judgment n.o.v. (now "JAML") and the issuance of a mandate direcitng entry of a money judgment in accordance with a jury's original verdict, a Court of Appeals must amend its mandate, upon motion timely made by the successful appellant, to include instructions with respect to the allowance of interest.

2. If so, whether the Seventh Amendment and 28 U.S.C., § 1961(a), require that such interest run (1) from the date the original money judgment was entered pursuant to the jury verdict, or (2) only from the date judgment for the identical sum was entered four years later pursuant to the appellate mandate.

PARTIES TO THE PROCEEDINGS

The caption of the case in this Court contains the names of all parties to the proceedings in the Court of Appeals below whose judgment is sought to be reviewed. Petitioner has no parent corporation and no nonwholly owned subsidiaries.

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OPINIONS AND ORDERS BELOW

The Opinion of the Court of Appeals, dated March 28, 1994, is reported at 19 F.3d 1259 and is reprinted in Petitioner's Appendix *infra* (App., pp. 1a-15a).

The Mandate of the Court of Appeals issued on July 28, 1994, filed in the District Court on August 1, 1994, and consisting of a clerk's Judgment dated March 28, 1994, is unreported and is reprinted at page 17a of Petitioner's Appendix. *See* Clerk's explanatory certificate. App., p. 16a.

The Order of the Court of Appeals entered on August 18, 1994, denying Petitioner's motion to amend its Mandate, is unreported and is reprinted at page 18a of Petitioner's Appendix.

The Order of the Court of Appeals entered on September 8, 1994, denying Petitioner's motion for reconsideration of its aforesaid Order of August 18, 1994, is un-

reported and is reprinted at page 19a of Petitioner's Appendix.

Although irrelevant to the questions presented, and therefore not reprinted in Petitioner's Appendix, the Opinion of the District Court dated January 8, 1992, which the Court of Appeals affirmed in part and reversed in part, is reported at 792 F.Supp. 1520.

JURISDICTION

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C., § 1254(1). The Court of Appeals entered and issued its Mandate on July 28, 1994, and thereafter entered its Order denying Petitioner's timely motion to amend its Mandate on August 18, 1994. App., p. 18a. Petitioner seeks a writ of certiorari for this Court to review said Mandate and Order. The Court of Appeals denied Petitioner's petition for rehearing with respect to said Mandate and Order, namely, its timely motion for reconsideration, on September 8, 1994. App., p. 19a. This Petition for a Writ of Certiorari was filed within ninety days thereafter.

CONSTITUTIONAL PROVISION, STATUTE AND RULE INVOLVED

United States Constitution. Seventh Amendment

> . . . [T]he right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

28 U.S.C., § 1961(a). Interest

> Interest shall be allowed on any money judgment in a civil case recovered in a district court. . . . Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. . . .

F.R.A.P. Rule 37, 28 U.S.C.A. Interest on Judgments

> Unless otherwise provided by law, if a judgment for money in a civil case is affirmed, whatever interest is allowed by law shall be payable from the date the judgment was entered in the district court. If a judgment is modified or reversed with a direction that a judgment for money be entered in the district court, the mandate shall contain instructions with respect to allowance of interest.

STATEMENT OF THE CASE

In 1984, Respondent Jacobs Manufacturing Company ("Jacobs") sued Petitioner Sam Brown Company ("SBC") on open account. SBC counterclaimed for fraud.[1] Six years later, after a three-week jury trial, SBC's counterclaim was submitted to the jury.

On **September 11, 1990**,[2] the jury found the issues in favor of SBC on its counterclaim and awarded SBC $2,491,792.35 in compensatory damages. It also awarded SBC, because of Jacobs' egregious deceit detailed in the Court of Appeals' opinion, $2.7 million in punitive damages. App., pp. 20a-21a. However, before the case went to the jury, the district judge granted Jacobs' motion for a directed verdict on its claim against SBC for $727,732.82, a money judgment for which was later entered in Jacobs' favor as of that same date, *i.e.*, September 11, 1990.

On **September 12, 1990,** in accordance with the jury's verdict and one day after it was returned, a money judgment was entered in SBC's favor on its counterclaim against Jacobs in the aggregate sum of $5,191,792.35. App., pp. 20a-21a.

Almost sixteen months later, on **January 8, 1992,** the district court granted Jacobs' post-trial motion for judg-

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[1] In the first instance, the basis for federal jurisdiction in the district court was diversity pursuant to 28 U.S.C., § 1332.

[2] Because of their importance to the questions presented, certain dates will appear in bold for the Court's convenience.

ment n.o.v. (now judgment as a matter of law or "JAML") and vacated the jury's verdict in SBC's favor in its entirety. SBC appealed.

More than two years after the district court ruled, and nearly four years after the jury's verdict, on **March 28, 1994,** the Court of Appeals (1) affirmed the directed verdict on Jacobs' claim against SBC but (2) reversed outright the district court's grant of JAML and new trial on SBC's counterclaim, and (3) ordered the district court to enter judgment in favor of SBC "in accordance with the jury's verdict," *i.e.*, the verdict for $5,191,792.35 returned almost four years earlier. App., p. 15a.

On **July 28, 1994,** following the denial of Jacobs' petition for rehearing and its motion to stay the appellate mandate pending a determination by Jacobs whether to seek certiorari, said mandate was issued and sent by letter that same day to the district clerk.[3]

On **August 1, 1994,** the district clerk filed the Court of Appeals' mandate. App., p. 17a. After obtaining a copy of it from the district clerk's office, since the appellate clerk as a matter of Eighth Circuit practice never sends copies to the parties,[4] SBC discovered that, contrary to F.R.A.P. Rule 37, 28 U.S.C.A., it contained no instructions whatever with regard to the allowance of interest. App., p. 17a.

The first sentence of Rule 37 states that "if a judgment for money in a civil case is *affirmed,* whatever interest is allowed by law shall be payable from the date the judg-

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[3] Jacobs did thereafter petition this Court for a writ of certiorari (Case No. 94-653) on an issue unrelated to the questions presented here, which petition was denied on November 7, 1994.

[4] *See,* certification of Michael E. Gans, Eighth Circuit Clerk, who also certified that his Clerk's "Judgment" dated March 28, 1994 (App., p. 16a) did not become the appellate "Mandate" until July 28, 1994, the date that it was issued and sent to the district clerk. App., p. 17a.

ment was entered in the district court."[5] However, the second sentence of Rule 37 then states that "[i]f a judgment is modified or *reversed* with a direction that a judgment for money be entered in the district court," in this instance in accordance with the verdict the jury returned on September 11, 1990, "the mandate *shall* contain instructions with respect to allowance of interest." Italics supplied.

On **August 8, 1994,** mindful of the Appellate Rules Advisory Committee's official note to Rule 37, which addresses the unsettled implications of *Briggs v. Pennsylvania R. Co.,* 334 U.S. 304, 68 S.Ct. 1039, 92 L.Ed. 1403 (1948), SBC filed its timely motion with the Court of Appeals to amend its mandate to provide instructions "with respect to the allowance of interest" now that the 1990 jury verdict in SBC's favor, which had been erroneously vacated four years earlier, had been reinstated by the Court of Appeals.

September 12, 1990, the date that SBC's original money judgment was entered pursuant to the jury's verdict, was the date from which SBC moved that postjudgment interest should be allowed. The applicable Treasury Bill rate at the time, pursuant to 28 U.S.C., § 1961(a), was 7.95%. This is the same rate applicable to Jacobs' much smaller original money judgment, entered one day earlier, which the Court of Appeals affirmed.

On **August 18, 1994,** the Court of Appeals, without any explanation whatever, refused to recall its mandate. It simply denied SBC's motion to amend said mandate in a one-line Order. App., p. 18a.

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[5] In so providing, Rule 37 mirrors 28 U.S.C., § 1961(a) [§ 811 at the time of *Briggs*, cited in SBC's statement of the Questions Presented], which provides, "Interest shall be allowed on any money judgment in a civil case recovered in a district court. . . . Such interest shall be calculated from the date of the entry of the judgment, . . ." Brackets supplied.

On **August 25, 1994,** just one week later, the District Court entered its Order and concurrent clerk's Judgment reinstating the jury's 1990 verdict for $5,191,792.35. However, because the Court of Appeals had refused to amend its mandate to include instructions regarding the allowance of interest, the District Court had no choice but to direct that interest would only run from that date, **August 25, 1994,** at the current Treasury Bill rate of 5.49% per annum, *not* from **September 12, 1990,** the date that SBC's original money judgment was entered for the same amount, when the rate was 7.95%. App., pp. 22a-24a, 25a-26a.

On **September 8, 1994,** the Court of Appeals also denied SBC's timely motion for reconsideration of its August 18, 1994 Order, again without explanation in a one-sentence Order. App., p. 19a.

By reason of the Court of Appeals Order denying SBC's motion to amend its mandate, and computing from September 12, 1990 through only August 31, 1994, SBC has been deprived of almost $2 million ($1,969,468.52, to be exact) in postjudgment interest.

By contrast, from September 11, 1990 through August 31, 1994, and only because its original judgment for a much smaller sum was *affirmed*, instead of vindicated by *reversal* like SBC's original judgment entered one day later, Jacobs is entitled to $259,474.74 in postjudgment interest.

It is from this Statement of the Case that the questions presented arise, questions that are now the subject of sharply conflicting decisions in different federal Courts of Appeals because they were not resolved by this Court in *Briggs*.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD RESOLVE A SHARP CONFLICT AMONG THE FEDERAL CIRCUITS WHICH IS THE TROUBLESOME LEGACY OF *BRIGGS v. PENNSYLVANIA R. CO.*, 334 U.S. 304, 68 S. CT. 1039, 92 L.ED. 1403 (1948).

A reading of *Briggs v. Pennsylvania R. Co.*, 334 U.S. 304, 68 S. Ct. 1039, 92 L.Ed. 1403 (1948), will confirm that the questions presented, which have now produced a plethora of conflicting decisions among the federal circuits, were virtually identical to those presented here—with one crucial difference. In *Briggs* they were not preserved below. In this case they were.

It was for this reason only, "[n]o motion to recall and amend the [appellate] mandate [having] been made," that a bare majority concluded in *Briggs*, "Hence the question whether interest might, on proper application, have been allowed, is not reached." *Id.*, 334 U.S. at 305, 307, 68 S. Ct. at 1040, 92 L.Ed. at 1404, 1405.

In *Briggs* a jury verdict was returned for $42,500 and, like here, erroneously vacated. When the trial court was reversed and ordered to enter judgment in accordance with the jury's verdict, again like here, the appellate mandate contained no provision for interest whatever.

Unlike SBC in this case, the plaintiff in *Briggs* filed no motion with the Court of Appeals to amend its mandate to provide instructions with respect to the allowance of interest. Thereafter, the district court simply added interest to the reinstated jury verdict, on the assumption that it was the logical thing to do, from the date it was originally returned.

On appeal to the Second Circuit Court of Appeals, the district court in *Briggs* was reversed. Correctly so, this Court concluded, because, *id.* 234 U.S. at 306, 68 S. Ct. at 1040, 92 L.Ed. at 1405:

> [A]n inferior court has no power or authority to deviate from the mandate issued by an appellate court. . . . The latter court's mandate made no provision for such interest and the trial court had no power to enter judgment for an amount different than directed. *If any enlargement of that amount were possible, it could be done only by amendment of the mandate. But no move to do this was made.* . . . Italics supplied.

Since the plaintiff had failed to preserve the issue, this Court's bare majority declined to resolve in *Briggs*, over the dissent of Justice Rutledge writing for the minority, the equally important further questions that SBC *did* preserve here. Specifically, since *Briggs* held that interest is not *implicitly* included in an appellate mandate, the unresolved questions remain whether a Court of Appeals *must*, upon timely motion to amend, *explicitly* provide for the allowance of interest and, if so, whether such interest runs from (1) the date of the original money judgment entered pursuant to the jury verdict that was erroneously vacated, or (2) "only from the time of entering judgment after receipt of the appellate court's mandate." *Briggs*, 234 U.S. at 307-309, 68 S. Ct. at 1041, 92 L.Ed. at 1406 (Rutledge, J., dissenting).

The *Briggs* minority deplored the Court's failure to resolve these important questions because, absent such resolution, they were bound to generate future controversy. And so they have. As discussed in Section III *infra*, the date from which interest is to be calculated is now the subject of sharply conflicting decisions, not to mention a heated division of opinion among circuit judges themselves, in different Courts of Appeals. In the interest of assuring future uniformity and providing needed guidance, this alone provides sufficient reason for this Court to resolve the important questions presented.

Absent a definitive resolution, there will remain a potential for injustice in every case where, like here, (1) an erroneous JAML is reversed outright, (2) a jury's verdict

is reinstated years later after a protracted appeal, and (3) an appellate mandate is issued, one mute with regard to interest, directing entry of judgment for a sum identical to the sum in the successful appellant's original money judgment that never should have been vacated in the first place.

II. BECAUSE THE QUESTIONS PRESENTED WERE NOT DECIDED IN *BRIGGS*, THERE IS AN OFFICIAL ADVISORY COMMITTEE NOTE TO F.R.A.P. RULE 37, 28 U.S.C.A., REMINDING ALL COURTS OF APPEALS, THEIR CLERKS AND COUNSEL OF THE SERIOUS PROBLEM REGARDING POST-JUDGMENT INTEREST. IN ORDER TO AVOID INJUSTICE AND PROVIDE GUIDANCE, THIS COURT SHOULD NOW RESOLVE THE POST-JUDGMENT INTEREST PROBLEM.

It is noteworthy that there is an official Advisory Committee note to F.R.A.P. Rule 37, 28 U.S.C.A., that addresses the troublesome legacy of *Briggs* and cautions that:

> Since the [*Briggs*] rule directs that the matter of interest be disposed of by the mandate, in cases where interest is simply overlooked, *a party who conceives himself entitled to interest from a date other than the date of entry of judgment in accordance with the mandate should be entitled to seek recall of the mandate for determination of the question.* Italics supplied.

This is precisely what SBC tried to do. Without explanation, the Court of Appeals simply denied SBC's motion to amend its mandate in a one-line Order. App., p. 18a.

Ironically, because of this Court's ruling in *Briggs* and its bare majority's failure to resolve the questions now presented, SBC finds itself stripped by a one-line Order, no reason given, of almost $2 million in interest. SBC is firmly convinced, however, that it is entitled to such interest not only pursuant to 28 U.S.C., § 1961(a), but more

importantly, as a mater of Constitutional right under the Seventh Amendment.

Absent this Court's willingness to resolve the conflict among the federal circuits in SBC's favor, the integrity of SBC's 1990 jury verdict will be demeaned and its value diminished. Jacobs will receive an unconscionable windfall, specifically, the interest-free use of SBC's $5.2 million that should have been paid four years ago, after the jury returned its verdict, pursuant to SBC's original money judgment that was erroneously vacated.

Absent the Court's intervention, this will occur because:

1. Although 28 U.S.C., § 1961(a), states "[i]nterest shall be allowed on any money judgment in a civil case recovered in a district court . . . [and] shall be calculated from the date of the entry of the judgment," the questions left unanswered in *Briggs* make it uncertain which judgment is referred to, (1) SBC's original money judgment entered on September 12, 1990 (App., p. 20a) that was vindicated on appeal by the outright reversal of the trial court, or (2) the judgment entered four years later for the identical sum on August 25, 1994, pursuant to the appellate mandate (App., pp. 25a-26a).

2. Only if an original money judgment is *affirmed* is the answer clear, *viz., "if a judgment for money in a civil case is affirmed,* whatever interest is allowed shall be payable from the date the judgment was entered. . . ." F.R.A.P. Rule 37, 28 U.S.C.A. Thus, the date is September 11, 1990, in the case of Jacobs' original money judgment.

3. "*If a judgment is modified or reversed,*" in this instance the trial court's erroneous judgment n.o.v. (now "JAML") vacating SBC's original money judgment entered on September 12, 1990, "the mandate *shall* contain instructions with respect to the allowance of interest." F.R.A.P. Rule 37, *supra.* However, the mandate here contained no such instructions at all.

4. Absent such instructions, and as a consequence of *Briggs* and its failure to resolve the questions presented, the inclusion of interest from the date of SBC's original money judgment cannot be inferred. This is why the Advisory Committee in its warning and note to F.R.A.P. Rule 37, *supra,* stated that "a party who conceives himself entitled to [such] interest . . . *should be entitled to seek recall of the mandate for determination of the question.*"

5. SBC did exactly what the Advisory Committee cautioned it to do. The Court of Appeals, however, denied SBC's timely motion to amend is mandate without explanation.

Paradoxically, Jacobs will therefore receive the unconscionable interest-free use for four years of the $5.2 million that the jury awarded SBC. To add insult to injury, and only because its own money judgment for a much smaller sum was *affirmed* rather than vindicated by an outright *reversal,* Jacobs will also receive for the same four years over a quarter of a million dollars in interest on that judgment.

Only this Court, by addressing the unsettled legacy of *Briggs* and resolving the conflict among the circuits discussed *infra,* can extricate SBC from such a "Catch-22" and prevent the same injustice from recurring in the future.[6]

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[6] The flyleaf to Joseph Heller's classic could not put it better. "Catch-22: It's a legal loophole that means just when you're sure you've won, . . . you lose!" *Catch-22,* J. Heller, Dell Publishing Co., Inc., 1985 Edition.

III. THERE ARE SHARPLY CONFLICTING DECISIONS AMONG THE DIFFERENT COURTS OF APPEALS WHETHER INTEREST RUNS FROM (1) THE DATE OF AN ORIGINAL MONEY JUDGMENT ENTERED PURSUANT TO A JURY VERDICT ERRONEOUSLY VACATED, OR (2) THE DATE OF A LATER MONEY JUDGMENT FOR THE SAME AMOUNT ENTERED PURSUANT TO AN APPELLATE MANDATE REVERSING THE TRIAL COURT AND REINSTATING THE JURY VERDICT.

Briggs left unanswered a fundamental question, namely, from what date does interest run where a jury verdict that was erroneously vacated by a District Court is reinstated many years later by a Court of Appeals?

That question is now the subject of sharply conflicting decisions in different Courts of Appeals, just as the *Briggs* minority predicted it would be.[7]

Specifically, the position of the Eleventh Circuit, the First Circuit, the Seventh Circuit and, until now, the Eighth Circuit, is stated in *DeLong Equipment v. Washington Mills Electro,* 997 F.2d 1340 (11th Cir. 1993), cert. denied 510 U.S. ——, 114 S.Ct. 604, 126 L.Ed.2d 569 (on an unrelated issue); *Cordero v. De Jesus-Mendez,* 922 F.2d 11 (1st Cir. 1990); *Graefenhain v. Pabst Brewing Co.,* 870 F.2d 1198 (7th Cir. 1989); and *Buck v. Burton,* 768 F.2d 285 (8th Cir. 1985). That unequivocal position is that where a judgment n.o.v. ("JAML")

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[7] "[Petitioner] seeks as of right interest given by § 811 [now 28 U.S.C., § 1961(a)]. . . . The extent to which the section gives interest is, of course, a distinct question, depending in this case on whether the section contemplates that the interest shall begin to run at one date or another. . . . The question is of considerable importance for the proper and uniform administration of the statute; . . . the uncertainty as well as the conflict of decisions should be ended. There is no good reason for permitting their indefinite continuance, to the perplexity of courts and counsel, and to an assured if unpredictable amount of injustice to litigants. *Briggs,* 334 U.S. at 313-314, 68 S. Ct. at 1043-1044, 92 L.Ed. 1408-1409 (Rutledge, J., dissenting).

is reversed outright and a jury verdict is reinstated in full, postjudgment interest runs as a matter of law from the date that the original money judgment was entered pursuant to the jury verdict, *not* from the date of the subsequent money judgment for the identical sum entered years later pursuant to the appellate mandate.

A diametrical opposite point of view is shared by the Fifth Circuit and Second Circuit, one stated in *Affiliated Capital Corp. v. City of Houston,* 793 F.2d 706 (5th Cir. 1986); and *Smith v. National R.R. Passenger Corp.,* 856 F.2d 467 (2d Cir. 1988). That position is that, notwithstanding the above circumstances, it is not required that postjudgment interest run from the earlier date but only from whatever date the Court of Appeals deems equitable, including the latter date, as determined on a case-by-case basis.

In *DeLong Equipment v. Washington Mills Electro, supra,* 997 F.2d 1340, only last year the Eleventh Circuit reinstated an erroneously vacated jury verdict awarding damages for fraud and antitrust damages that were trebled. As here, the appellate mandate was completely silent regarding the allowance of postjudgment interest.

Just as SBC did, the plaintiff in *DeLong* moved that the Court of Appeals amend its mandate to include interest from the date of the original money judgment. Unlike the Eighth Circuit in the instant case, which ignored F.R.A.P. Rule 37 by refusing without explanation to amend its mandate, the Eleventh Circuit Court of Appeals did amend its mandate to explicitly provide for such interest.

After tracing the history of the so-called *Briggs* default rule and the interest problem left unresolved by *Briggs,* the Eleventh Circuit noted that Rule 37 itself "does not aid an appellate court in determining how to instruct a district court on the award of postjudgment interest." *DeLong,* 997 F.2d at 1341. It concluded, however, *id.* at 1342:

> In cases such as this one, which reinstate a jury verdict for the plaintiff, we think that equity ordinarily, *and perhaps always,* commands that interest be awarded from the date of the original judgment. There are several reasons for this. First, and most important, it is necessary to protect the integrity of the jury verdict. . . . *We think DeLong might have a serious Seventh Amendment claim if we were to rule otherwise.*
>
> Secondly, we note that [the defendant] has been able to put the $6 million to use . . . for nearly three years since a jury found [for the plaintiff]. . . . That the district court erroneously set aside the earlier judgment should not result in a transfer of wealth from [the defendant] to its victim, DeLong. In short, the flip side of the potential windfall to [the defendant] would be a penalty to DeLong: as the First Circuit stated in a similar case, '[c]alculating interest from the date of the second judgment would penalize [the plaintiff] for the trial judge's error.'

Italics and some brackets supplied.

After citing *Cordero v. De Jesus-Mendez, supra,* 922 F.2d 11, confirming that the First Circuit shares the same point of view, the Eleventh Circuit in *DeLong* flatly rejected the contrary view of the Fifth Circuit in *Affiliated Capital Corp. v. City of Houston, supra,* 793 F.2d 706, because "[a]ny other rule would interfere with the right to jury trial by effectively reducing the jury award without a holding that the jury granted an inappropriate figure." *DeLong,* 997 F.2d at 1343.[8]

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[8] The Eleventh Circuit noted, citing *Woods Exploration & Producing Co. v. Aluminum Co. of Am.,* 508 F.2d 784 (5th Cir. 1975), that the Fifth Circuit, before later changing its mind, had previously agreed with the Eleventh Circuit's position. *DeLong,* 997 F.2d at 1342. It also noted that its reading of *Kaiser Alum. and Chem. Corp. v. Bonjorno,* 494 U.S. 827, 110 S. Ct. 1570, 108 L.Ed.2d

The Seventh Circuit came to the same conclusion in *Graefenhain v. Pabst Brewing Co., supra,* 870 F.2d at 1211, holding that "unless the mandate of the appellate court alters the original judgment in more than relatively minor respects, interest should attach from the date of the pre-appeal judgment. . . . Since our prior opinion reinstated the jury's verdict, this rule should apply to the present case."

In *Affiliated Capital Corp. v. City of Houston, supra,* 793 F.2d 706, cited and rejected in *DeLong,* the Fifth Circuit came to an opposite conclusion. A sharply divided court, upon motion of the successful appellant to amend its mandate to provide instructions regarding interest, acknowledged that decisions in the Eighth and Ninth Circuits [9] supported the plaintiff's claim that it was entitled to interest "from at least the date of the district court's erroneous judgment n.o.v. . . ." *Id.*, 793 F.2d at 708. It also acknowledged that the date from which interest runs is "still [an] unsettled area of the law." *Id.* at 708. The *Affiliated* majority concluded, however, that although the plaintiff won on appeal and the jury verdict was reinstated, its reading of § 1961 and Rule 37 does not require a court of appeals to direct that interest run from any fixed date because "[s]uch a 'rule' ignores the fact that 'equities' vary from case to case." *Id.* at 710.

As for the "equities" in *Affiliated,* the Fifth Circuit majority concluded, "Affiliated's victory was far from clear-cut," and besides, it was not going to go "uncompensated for the loss of value on its money judgment" because its jury award for antitrust damages would be trebled anyway. *Id.* at 711-712. Interest was therefore

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842 (1990), although different issues were involved, supports its belief that the Eleventh Circuit view is the right one, not the current Fifth Circuit view. *Id.* at 1342 n.1.

[9] *Buck v. Burton,* 768 F.2d 285 (8th Cir. 1985), and *Turner v. Japan Lines, Ltd.,* 702 F.2d 752 (9th Cir. 1983).

allowed only from the date of judgment entered pursuant to the appellate mandate.

The *Affiliated* minority sharply disagreed, reminding the majority, *id.* at 713-714:

> But for the erroneous ruling of the District Court, the plaintiff would have had the use of the money awarded by the jury's verdict. . . . The 'equity' done by the majority penalizes the victorious plaintiff for the District Court's error, and gives the defendant a windfall. . . . Considering the functions of interest, it hardly seems significant, in equity or otherwise, that the case was close, involved difficult issues, or engendered a vigorous dissent. . . . A win, whether by four touchdowns or a last second field goal, is a win.

Unlike the First Circuit, the Seventh Circuit, the Eleventh Circuit and the Fifth Circuit's minority, the Second Circuit agrees with the Fifth Circuit's majority, holding in *Smith v. National R.R. Passenger Corp., supra,* 856 F.2d 467, that although such interest in the second Circuit used to run from the date of judgment entered pursuant to the appellate mandate, now the date will be determined on a case-by-case basis depending on the equities. In *Smith, id.* at 473, and only because the "equities" so dictated, the Second Circuit held that date to be the same date that judgment was originally entered pursuant to the jury verdict.

Based on its unexplained refusal to amend its mandate here, what opposing camp the Eighth Circuit belongs to is uncertain. Until now, it appeared to subscribe to the First, Seventh and Eleventh Circuits' school of thought. In *Buck v. Burton, supra,* 768 F.2d 285, after noting it had not previously ruled on the issue, the Eighth Circuit concluded that the successful appellant should receive interest on the loss of the use of its money judgment "from the date damages were ascertained—that is, the date upon which plaintiff's original judgment should have

been entered had the district court not erroneously granted judgment n.o.v." *Id.* at 287.

Since the Eighth Circuit denied SBC's motion to provide instructions regarding interest, as well as SBC's motion for reconsideration in which SBC reminded the court of its previous ruling in *Buck*, we can only assume either the Eighth Circuit is now uncertain what its position should be or has elected for some undisclosed reason simply to ignore § 1961(a) and Rule 37. This further underscores the importance of granting certiorari in this case. As Justice Rutledge recognized in *Briggs*, the prime responsibility for the proper functioning of the federal judiciary, when it comes to procedural issues of this magnitude, rests obviously with this Court.[10]

It is thus apparent, based on the above survey of the reported cases, that a sharp conflict in decisions exists between different Courts of Appeals, not to mention a heated difference of opinion among circuit judges themselves. Perhaps the chaotic situation is best summarized by the First Circuit, which observed in *Clifford v. M/V Islander*, 882 F.2d 12, 13-14 (1st Cir. 1989):

> [S]ection 1961(a) provides that postjudgment "interest shall be calculated from the date of the entry of the judgment." This deceptively straightforward language has led federal judges to a plethora of conflicting conclusions. In cases where a judgment for money damages was entered, then later vacated, then eventually supplanted by a second dollar judgment (in whatever amount) the circuits are in great disarray as to when the postjudgment interest meter clicks into the "ON" position.

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[10] In this regard, Circuit Judge Brown's statement in *Affiliated Capital Corp. v. City of Houston, supra*, 793 F.2d at 713, is both noteworthy and relevant. He acknowledged that "[a]lthough I am the first to recognize that issuance of the mandate is essentially ministerial by the Clerk so that no judge was responsible for this mistake, the error was nevertheless ours. However it happened, this is hardly an equity against the ultimate victor."

It was the expressed hope of the First Circuit in *Clifford, id.* at 14, that the matter would be resolved by this Court in *Kaiser Alum. and Chem. Corp. v. Bonjorno,* 494 U.S. 827, 110 S. Ct. 1570, 108 L.Ed.2d 842 (1990), where certiorari had just been granted. Regrettably, that did not happen. Instead, "disarray" among the circuits persists.

Given the troublesome legacy of *Briggs,* which continues unabated to confound this recurring aspect of appellate practice, it is time for this Court to resolve the conflict and provide needed future guidance.

CONCLUSION

Because of the importance of the questions presented, and for all of the reasons stated, SBC's Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit should be granted.

Respectfully submitted,

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